Supreme Court, U.S.
FILED
06-165 2006
OFFICE OF THE CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

VALERI MARKOVSKI

Petitioner,

V.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

ON PETITION FOR A WRIT OF CERTORARI
TO THE UNUTED STATES COURT OF APPEALS
&
TO THE UNITED STATES TAX COURT

PETITION FOR WRIT OF CERTIORARI

Valeri Markovski
1512 Palisade Ave.
Apt. 20 P
Fort Lee, NJ 07024
Tel. 201 947 45 54

I
QUESTIONS PRESENTED.

1. Did The Tax Court committed clear error in failing to evaluate that, after making substantial adjustments to the company American Valmar's income, Valmar did not have sufficient earnings and profits to support constructive dividends to its owner Markovski?

2. Did the Tax Court committed an error, holding that the wire transfers from Russia of Markovski's lifetime savings, accumulated prior his emigrations, to his personal account in United States, are taxable income to company Valmar and to Markovski?

3. Is the Court of Appeals Decision to dismiss Markovski's appeal as untimely filed erroneous? According to the Federal Rules of Appellate Procedure, did Markovski filed Notice of Appeal on time?

4. Is the United States Tax Court Decisions conflict with Decisions and rulings of the United States Court of Appeals, who remanded this case to the Tax Court twice and initially accepted the third Notice of Appeal?

5. Are the Tax Court Decisions controversial and conflicting?

TABLE OF CONTENTS

Questions Presented.....I

Table of Contents.....II

List of Parties.....III

Table of Authorities. III

Statutes.....III

Jurisdiction.....III

Statement of the Case.....1 – 22

Summary.....20-22

Reasons for granting the Writ of Certiorari..... 22-23

Index of Appendixes.....A

Appendixes.....A-1 – A-29

LIST OF PARTIES

All Parties appear in the caption of the case on the cover page.

TABLE OF AUTHORITIES

American Valmar Int'l Ltd v. Comm'r of Internal Revenue,
229 F.3d 98 (2d Cir 2000).....3, 6, 7, 8, 9

DiZenzo v. Comm'r of Internal Revenue,
348 F. 2d 122 (2d Cir.1965).....4, 11, 16

STATUTES

Federal Rules of Appellate Procedure 4 (4) a.....18
Federal Rules of Appellate Procedure 5 (d).....18
Federal Rules of Civil Procedure, Rule 58 (a) (1)..... 19
Rules of the Supreme Court of the United States, 13.3
...page 18

JURISDICTION

The date on which the United States Court of Appeals denied my Notice of Appeal was February 13, 2006.
A copy of that decision appears at Appendix A-27.
The date on which the United States Court of Appeals denied my Motion of Reconsideration was April, 2006.

STATEMENT OF THE CASE

Valeri Markovski is individual, who emigrated from the former Soviet Union to the United States in 1989 and had received his permanent status of resident alien in 1991; he became American citizen later. At that time he was 46 years old. Back in Russia he used to be a successful businessman and accumulated a substantial wealth.

The Opinion of United States Tax Court affirmed this fact: "**We believe that Markovski did accumulate some substantial amount of wealth before he emigrated to the United States",** (The Tax Court Opinion, November 19, 1998). This conclusion was based on unchallenged testimony of witnesses and documents presented to The Tax Court.

Upon receiving a temporary status Markovski immediately had taken an action to transfer his wealth to dollars and to wire transfer it in a few shifts to his personal account in the United States.

At the same period of time Valeri Markovski had formed a company American Valmar International ("Valmar")[1]. It became active in 1991.

Valmar was a commissioner broker, who purchased and exported American goods from US-based companies on behave of his Soviet Union customers. He supplied customers with computers and computer's and electrical equipment, completed contract with company "Ford" and shipped 60 tracks

---

[1] Markovski is a sole owner of American Valmar int., Ltd.

to Siberia and so on. Valmar worked on "pre-paid" basis: customers made deposits before they received merchandise. He has hired independent company Advanced Accounting Services, Inc. for his accounting and bookkeeping.

Commissioner of Internal Revenue ("Commissioner") circumstantially attributed all of the year-end balances of customer deposits and all of the Markovski's lifetime saving, accumulated by him prior his immigration and wire transferred from Russia to his personal accounts, also sweeping there amounts, already paid by contracts, as "disallowed purchases", to Valmar, and issued notice of deficiency.

United States Tax Court ("Tax Court") called Commissioner's method a "wholesale rejection" but sustained IRS position regarding customer's deposits. Tax Court also decided that Markovski's personal savings are taxable income to Valmar and constructive dividend to Markovski for tax year 1991.

Markovski appealed Tax Court decision with United States Court of Appeals ("Court of Appeals"). Court of Appeals had found a numerous flows in the Tax Court decision. It decided: "**We agree with Valmar that customer funds on deposit to be used to purchase goods for customer should not have been included as taxable income. Rather, only commissions earned by Valmar ...should have been included**".

Regarding "disallowed purchases" it stated: "The **deduction issues are moot if none of the year-end balances in the customer account are taxable**

income".

The Court of Appeal also sad: "Because we have not reversed the Tax Court as to the "ruble hoard" transfers and cannot predict what portion of the deposits the Tax Court will find to be excluded from Valmar's taxable income, we will leave this issue to future proceedings and express no view on it". (Court of Appeal's Opinion, October 4, 2000. A-16.)

The Court of Appeal remanded the case back to the Tax Court with instructions to correct errors.

The Tax Court Judge Halpern decision of November 1998 was based on theory, that customer's deposits were includable to Valmar's income and the year-end balance of $1,426,653 is in fact Valmar's earnings and profits. Therefore, he came to conclusion: "**Since petitioners have failed to prove an insufficiency in American Valmar earnings and profits, the distributions are dividends includable in Markovski's 1991 gross income."**

On remands, Commissioner in its Respondent Status Report of October 23, 2001, conceded all of the customer deposits: "**Respondent concedes the Gross Receipt adjustment of 1,426,653**... for the taxable year ending June 30, 1991".

Commissioner agreed that "year-end balances in petitioner's account may qualify as customer deposits which the petitioner had an obligation to use for its customers or to refund." (Motion for Entry of Decision, July 2002.)

The Tax Court affirmed this decision.

Therefore, the base for theory that Valmar had sufficient earnings and profits to distribute dividends to Markovski in 1991, collapsed.

Commissioner never had any other proof why ruble hoard of Markovski's personal saving, accumulated by him prior his emigration, should be included in taxable income to Valmar and constructive dividend to Markovski.

1991 was the very first year of Valmar's business activity and its income tax return reflect correct numbers of gross income of $41,569 and $810 of earnings and profits.

Nevertheless, in its second Tax Court Decision Judge Halpern ignores the fact that adjustments to income to Valmar directly affect the issue of constructive dividends to Markovski and fails to revise it.

As The Court of Appeal hold in its case "United States v. D'Agostino", "**Corporate funds lawfully diverted by a shareholder constitute taxable income only to the extend that corporation had earning and profits during the tax year in which the diversion occurred".**

Therefore, The Court of Appeals decided and made the rule: "**no earning and profits, no income".** 145 F.3d 69, 72 (2d Cir.1998); "DiZenzo", 348 F.2d at 125 (holding that Tax Court erred in treating diverted corporate funds as income without considering whether the corporation had earning and profits equal to amount of the diverted funds).

Please, make a note, that in above case corporation made distribution to a shareholder, but in Markovski's case it is his personal ruble hoard, transferred from

Russia to his personal account, which has no whatsoever relation to the corporation Valmar.

In its second Decision (Sep. 24, 2002) Tax Court decided that Valmar's tax liability for 1991 was $ 307,752. This liability calculation was based on the Commissioner's Motion for Entry Decision (July 18, 2002), which alleges that Valmar's income for 1991 was $ 905, 513.

The compounds of number $905, 513 are:

a)$ 613, 410 of Markovski's personal ruble hoard.

b) $291, 293 of disallowed customer purchase, which had been paid to New Jersey based company Tower Research Int. according to contract agreement 2BK, back in 1990, for purchase of computers and computer's equipments for Valmar's Russian customer "Video computer".

The payment had been made in two installments: $127, 500 on 09.04.90 and $173, 500 on 09.10.90. This amounts had been conceded by Commissioner in "Second Stipulation of Facts", dated "June 23, 1997" and signed by Chief Counsel IRS Stuart L. Brown and Markovski's attorney Ira B. Stechel even before The First Tax Court trial.

In its "Petitioner's Statement", which Markovski filed with Judge J. Halpern, he provided all supporting documents, as:

1. Contracts with Tower Research.
2. Canceled checks.
3. Payment conformations.
4. Shipping documents.

5. Bills of lading.

6. Merchandise acceptance certificates.

(Originals of all documents and receipts are included in "Trial Exhibits").

He never received an answer of the Tax Court regarding this issue and amount $291, 293 is included in gross income of Valmar as of today.

In addition, it had been decided by The Court of Appeals that: "Of course, the deduction issues are moot if none of the year-end balances in customer account are taxable income" (May, 2000). (A-12).

The same approach should apply to "disallowed deduction" of $ 57, 137, which had been paid according to contract "Research and Development Joint Cooperative "Diapazon" (Jan.20, 1991).

Nevertheless, ignoring all of above facts and The Court of Appeals decision, Judge Halpern holds those amounts as income to Valmar.

He stated: "Petitioners had failed to prove that any adjustment with respect of remaining payments of $ 127,500 and $ 173,500 was made by respondent and, consequently, that any portion of deficiency determined for 1991 is attributable to a disallowance of such payments". (Here The Tax Court made a wrong math and further on it always refers to this two numbers as "$ 291, 293".)

As Markovski himself, so his former attorney Ira B. Stechel had tried on numerous occasions draw the Tax Court attention to the facts that above amount was:

a) Conceded by Commissioner.

b) The complete package of documents had been provided.

c) Funds belonged to Valmar's customers, not to Valmar.

d) Commissioner has no authority to "allow" or "disallow" what kind of merchandise for his customers Valmar should acquire, when merchandise are paid out of customer's funds.

It is evident that only one reason why The Tax Court went against all of the facts, it wanted to justify its erroneous holding that Valmar had earnings and profits to pay dividends to Markovski. Otherwise, what would be the theory or the base to attribute Markovski's personal savings to American Valmar?

Another compound of asserted to Valmar income for tax year 1991 is amount of $ 613, 410, which is nothing else, but personal lifetime saving of Markovski. The Tax Court has no any proof, why it holds it as income to Valmar.

The Tax Court did not revise the issue of Markovski's dividends, holding, that The Court of Appeals affirmed his position regarding this issue. However, the Court of Appeals stated: "We affirm the Tax Court in all other respects **save for various matters affected by our holding that genuine customer deposits were not income to Valmar." (A-3).**

Erroneous and misleading calculation of Commissioner that taxable income of Valmar for 1991 was $ 1,426,653, led to conclusion that Valmar had

sufficient funds to pay constructive dividends to Markovski.
On remand, after Commissioner conceded, that above amount was not taxable income to Valmar, but deposits of customers, it was evident, that Valmar's earnings and profits were insufficient to support the constructive dividends to Markovski.

Foreseeing possible concession, The Court of Appeals stated: "Appellants contend that if the customer deposits and wire transfers not included in Valmar's income, Valmar's earnings and profits ...are insufficient to support the constructive dividends to Markovski. Because we have not reversed the Tax Court as to ruble hoard transfers and **cannot predict what portion of the deposits the Tax Court will find to be excluded from Valmar's taxable income, we leave this issue to future proceedings..."** (A-16).

Therefore, The Tax Court ignored The Court of Appeals directions that customer deposit's concession directly affect the issue of constructive dividend to Markovski and failed to revise it.

The Court of Appeal decided: **"Because this Court believes that Markovski's position is likely to be of substance, it is ORDERED that counsel is appointed, *nostra sponte,* to assist Markovski with the appeal** on his own behalf..." and "**counsel should address whether the Tax Court committed clear error in failing evaluate whether, after its adjustments to Valmar income, that income was still sufficient to support the constructive dividends**

charged to Markovski's personal income in 1991". (US Court of Appeals, June 2003.) (A-17, A-18). Once again, the Court of Appeals clearly states that the new, reduced number of Valmar's earnings and profits directly affect the issue of Markovski's dividends and his ruble hoard and that computation is to be revised.

Therefore, The Tax Court errors, holding that the Court of Appeals affirms his position regarding this issue.

Appointed by the Court of Appeals attorneys and attorneys of IRS filed with the Court of Appeals - Stipulation for Remand, "...**so that The Tax Court may determine whether Valmar had sufficient earnings and profits for Valmar's 1991 taxable year to support a $613,410 taxable constructive dividend to Valeri Markovski in the 1991 tax year...**" (June 1994). (A-19 – A-21). The Motion was granted.

On remand, Markovski filed with The Tax Court and with Commissioner's attorney Joseph Boylan the number of documents, as "Petitioner's statement", where he once again provides all kind of proof that amount $ 291,293 is not taxable income to Valmar and, wherefore, is not earnings and profits to it. He also filed "Protest", where he provides eight counts of proof that amount $613,410 is exclusively his lifetime saving, accumulated by him prior his emigration, and has no whatsoever relation to Valmar. Markovski never received the response from the Tax Court.

During a new Tax Court trial (March 15, 2005) and in his follow up Decision (April 12, 2005) (A-22, A-23) Judge J. Halpern, fully ignoring The Court of Appeals ruling, did not address the issue of Markovski's constructive dividends, none the issue of if Valmar had sufficient earnings and profits to support those dividends. He applied unexplainable logic, finally reducing Valmar's earnings and profits by amount of $291,293, but including the same amount in Valmar's taxable income, once again qualifying it as "disallowed purchases".

In his new Decision (A-22, A-23) (April 12, 2005) The Tax Court affirmed Commissioner's computation "for the reasons set forth in the transcript of the hearing".

Here is Judge J. Halpern answer, which he gives in his transcript, to the task, given to him by the Court of Appeals, to evaluate, if Valmar had sufficient earnings and profits to distribute constructive dividends to Markovski: "*... it is not going to make much of a different, if there's earnings and profits or not...* " The same Judge decided in his Order of November 1998*: "Since petitioners have failed to prove an insufficiency in American Valmar 's earnings and profits, the distributions are dividends includable in Markovski's 1991 gross income".*

It is evident, that Judge J. Halpern manipulate with terms of Valmar's earnings and profits, as he is pleased. When initially he believed, that Valmar's earnings and profits for 1991 was $ 1,426,653, it was easy to implicate, that Valmar paid Markovski $613,410 in dividends, and at that time the issue of Valmar' earnings and profits was vital.

Now, when it became clear, that if Markovski's personal saving is not inclusive in Valmar's income, Valmar's earnings and profits is only $ 810, as it was reported in its income tax return, now " it is not going to make much different" any more.
But this brand new theory conflicts with The Court of Appeals instructions and its reasons why exactly it remanded the case back to The Tax Court.
It also conflicts with The Court of Appeals rule, which it created, deciding "United States v. D'Agostino" case: " **no earnings and profits, no income".** 145 F. 3d 69, 72 (2d Cir. 1998) and the base, on which this rule was created: **"Corporate funds lawfully diverted by a shareholder constitute taxable income only to the extend that corporation had earning and profits during the tax year in which the diversion occurred".**

Therefore, as a result of Tax Court hearing and Decision, the amount $ 291, 293, has not been conceded for income tax purposes. Markovski's personal savings were left inclusive in Valmar's gross income without any proof or base. Since Commissioner had started audit thirteen years ago, the theory was, that Valmar distributed dividends to Markovski out of its earnings and profits. This theory was continuously sustained by The Tax Court and reflected in all Tax Decisions and Orders. Now, then it became obvious, that Valmar had no earnings and profits to support such distribution, Commissioner's attorney J. Boylan and Judge J. Halpern came up with a new theory. They say, distribution to Markovski was

not made out of Valmar's earnings and profits, after all, but indeed, it was made out of capital gain. We will revue groundless of this theory in the next paragraph.

Because Markovski disagreed with The Tax Court holding, he appealed it with the Court of Appeal for a third time.

MARKOVSKI'S PERSONAL SAVINGS

Commissioner's conclusion that the wire transfers of $ 613,410, that had been send to Markovski directly from the U.S.S.R., represented income to Valmar and constructive dividend to Markovski, lacked any basis and is clearly erroneous. The base for this conclusion was assumption of IRS audit agent Linda Pardo that "People don't have money like this in Russia". So she testified in the Court. She also testified, that she made no effort to educate herself on that subject. (TR-298). That was basically all evidence, which Commissioner had to present to the Tax Court trial in 1998 as a proof of relation of Markovski's personal saving to Valmar.

In his decision, following the trial, The Tax Court confirmed that "respondent has no effective rebuttal" and decided: "We must weigh petitioner's... evidence against respondent's circumstantial evidence." (The Tax Court Order, November 1998).

Unlike the Commissioner, Markovski provided documentation, affidavits, and the testimony of several witnesses to support his position that he had amassed considerable wealth while a citizen and national of the U.S.S.R. Here is the list of the facts to support his

position:

1. The Tax Court affirmed, that Markovski had a substantial wealth: "We have found that Markovski accumulated the ruble hoard before he emigrated from Russia", and "We believe that Markovski did accumulate some substantial amount of wealth before he emigrated to the United States". (The Tax Court Order, 1998).

2. At trail witness Larissa Saltevskaya testified, that the funds (ruble hoard) had been stored with her by Markovski, and that she had delivered these funds to individual and owner "Diapozon" company Rubin Gevorkyan, who then wired it from USSR to Markovski's account to USA. (TR-38-40). This testimony was not challenged or impeached by Commissioner.

3. Affidavit from "Diapozon" (Joint Trial Exhibit 91-CM) confirms the transfer of Markovski's ruble hoard equivalent to $ 613.410 to his personal account in United States. This document clearly indicates that these transfers of Markovski's personal funds and have no any relation to Valmar.

Authenticity of this document was not challenged.

4. The wire transfers were made from U.S.S.R. to Markovski's personal account.

5. Valmar was never recipient of such amount in the whole sum, or by small portions, or by any other installment.

6. Because Soviet currency control restrictions in effect during the period of time wire transfers to Markovski's account were made precluded movement of none-business related currency transfers, such transfers necessitated to be done under guise of

business transfers. Therefore, Markovski's transfers had business notations such as "equipment contract 14-12-90", "By order of SV-Interrousa" and so on, which were disguise to make this transfers possible. Markovski's deposits dated April 22, 1991 and May 24, 1991($ 315, 591 and $ 133, 800) have a notation "equipment contract 14-12-90" (Trial Exhibit). However, if looked closely at Valmar's deposit, dated January 25, 1991 ($99,982.32) under details of payment it clearly states, that equipment contract 14-12-90 is contract OF Ukrainian Prod. Ass. and Energo – Technolo (Trial Exibit). It is clear that Valmar was not part of equipment contract 14-20-90. Moreover, not only Valmar never had business with these companies, he deeply doubt that they ever really existed.

The same applies to deposit, dated May 23, 1991 (113,519) that carries notation: "By order: SV Interrousa". Valmar did not receive any funds and did not do any business with SV Interrousa in 1991. In regard to deposit of May 31, 1991 ($ 50, 500) that carries notation; "Beneficiary: American Valmar, Int. Co." why would Diapozon make these notation on transfers to Markovski's personal account if Diapozon made business transfers directly to Valmar's business account.

7. International expert witness, attorney, versed in Soviet law, J. Balakhovsky, testified in the Court, that "The only way for a person to transfer his or hers funds abroad would be to disguise it as a business transaction." (TR 203-24). This testimony clearly showed the reason why the transfers to Markovski's account from then-Soviet Union bore what appeared to

be business-related notation and went unchallenged by IRS. It was otherwise accepted at trail by IRS agent Linda Padro: "He was an expert. I accept his opinion". (TR 298-299).

It was also accepted by the Tax Court: "Respondent did not challenged petitioner's expert's testimony, and we accept his opinion and find accordingly". (The Tax Court Order, Nov. 1998). (A-203).

8. Both, The Tax Court and Commissioner, agreed upon the fact that Valmar was exclusively commissioner broker and had no alternative sores of income. When at trail Commissioner had been approached by Judge with a question, what was a theory, how possibly could Valmar have earned such "mammoth commissions", they had no much to say. (TR-332-334).

9. The fact is that commission broker Valmar had charged on average 6% of commission. In order to collect $ 613, 410 in commissions, Valmar would have to facilitate transactions on behalf of its clients upwards of $ 10, 200, 000 ($ 10, 200, 000 *6% = $ 613, 410). However, the IRS's audit figures prove otherwise. It had been confirmed, that Valmar's contract purchases for a year in question totals $ 555, 341 (Notice of Deficiency. April 6, 1995. Page 7. Exp. of items.)

10. For thirteen years Commissioner had been trying to prove, that Valmar distributed its earnings and profits as a constructive dividends to Markovski. After it has been proved and established as a fact by both, the Tax Court and Commissioner, that Valmar had no that many earnings and profits, (and not even

close), the instructions, given on remand to the Tax Court by the Court of Appeals, have been completed. Nevertheless, Commissioner decided to give to Markovski's personal savings a new label: a capital gain. Here is its new reasoning: "Any amount received in excess... is treated as gain from sale or exchange of property." (Supplement. February, 2005).

It is a fact that fiscal year 1991, which is in question here, was the first year of Valmar's (newly created company) of operation. In fact, it was just completed its very first contract. So, what kind of property exactly Commissioner is trying to allege, if at that period of time Valmar even did not have resources to rent an office? All property, which Valmar possessed at a time, was a fax machine and an American flag in the corner of the tiny empty room, subleased in somebody's else office. Therefore, the brand new theory of a "capital gain" does not apply to Valmar and of course does not affect Markovski's dividends.

The Tax Court failure to revaluate issue of Markovski's dividends after new adjustment (even incomplete and partial as it is) to Valmar's income, goes in conflict with The Court of Appeals instructions and its rule: "No earnings and profits, no income". We described this rule and reasons, why it is applies here in details on the pages 8 and 9.

THE ISSUE OF TIMELY FILED APPEAL

I

On April 12, 2005, Judge James Halpern entered decision, which conflicted with the Court of Appeal instructions. He did not make any explanations or comments about his reasons. (A-22 – A-23).

Markovski filed a Motion to Vacate or Revise Decision with Chief Judge Joel Gerber on April 21, 2005. (Judge J. Halpern had failed to respond on all previously filed motions; Chief Judge Gerber issued the orders on this case and supervised it).

Markovski also contacted *pro se* Clerk office of the Court of Appeals and asked, what was a prestige to file an appeal with this Court. Without warning and letting him know, Clerk automatically switched his call to the District Court. (This is routine, practiced by *pro se* Clerk office; it has been repeated every time, when he called, and only on the third time it became clear that appellant was talking with a "wrong" Court).

After receiving by mail the District Court applications, instead of those of the Court of Appeals, surprised, Markovski called to the Clerk office of the Court of Appeals again, and had been "switched" to the District Court without his knowledge once more. Clerk explained to him that he is supposed to file his appeal *first* with the District Court, and then it will be proceeded to the Court of Appeals. Clerk also instructed Markovski "to write down *complaint* and to pay $250 docketing fee.

Markovski acted exactly as he was instructed and **he timely filed his petition on May 18, 2005.** Even if, following incompetent Clerk instructions, he filed it with "incorrect" court, The Federal Rules of Appellate

Procedure provided for such case in its Rules 5 (d) and 4 (4) (a).

On July 20, 2005, Chief Judge of U S District Court Michael B Mukasey entered Order of Dismissal on ground of lack of Jurisdiction: "The U S Court of Appeals... shell have exclusive Jurisdiction to review the decisions of U S Tax Court" (A-24 – A-26).

Therefore, on July 7, seven days after the Entry of Order, Markovski filed the Notice of Appeal. It had been accepted and docketed by the Court of Appeals on August 29, 2005.

The Commissioner filed the Motion to dismiss this appeal, claiming that appeal was untimely (one day later) filed. On February 13, 2006 the Court of Appeals granted Commissioner's Motion.

Rule 5 (d) of Federal Rules of Appellate Procedure says that if appeal is mistakenly filed with "incorrect" court, the clerk of that court must note the date when it was received; the "correct" court then should considered it filed on the date so noted.

Rule 4(4) (a) of Federal Rules of Appellate Procedure says: "If a party timely files in the district court, [a motion]... the time to file an appeal runs for all parties from entry of order disposing of the last such remaining motion."

Even **Under the Rules of the Supreme Court of the United States, (if applicable), "But if a petition for rehearing is timely filed in the lower court...the**

time to file the petition for a writ of certiorari...runs from the date of denial or subsequent entry of judgment. (Rule 13.3)

II

Markovski had failed the Motion to vacate or revise decision with Chief Judge of the Tax Court Joel Gerber. He did not receive Judge Gerber decision or order. He received instead the copy of his own Motion with a stamp on the top: "Filed Apr. 21 as motion to vacate or revise decision". It was underlined with a thick red ink. Another stamp was stamped on the top of original text and was unreadable (with exception of Judge Halpern signature and another date, "Apr. 26"), therefore this document was filed by petitioner as a "failing confirmation". Two months later Markovski contacted the secretary of the Tax Court with complaint that he still did not received a court judgment and then he found out that the copy of his motion was not a filing confirmation, but it was a judgment.

The **Federal Rules of Civil Procedure, in Rule 58 (a) (1)** says: **"Every judgment must be set forth on a separate document".**

The same requirements are within Rule 4 (7) (b) of Federal Rules of Appellate Procedure.

And if these Rules do not apply here, petitioner convinced, that the Tax Court Judgment at least must be readable.

The conclusion:

The date "Apr. 26" stamped on the top of

Markovski's own motion could not be considered as a date of the Entry of Judgment, after which time to file an appeal starts to run.

Under the Rules 4(4) (a) and 5 (d) of the Federal Rules of Appellate Procedure and Rule 58 (a) of the Federal Rules of Civil Procedure, Markovski filed notice of appeal timely.

The Court of Appeals decision to dismiss this already accepted and filed appeal, as untimely filed, is unjust and erroneous.

SUMMARY

1.Valmar's gross income for 1991 was $ 41, 707. However, it had made 105, 430 in 1992, and 124, 270 in 1993. It was a developing company with growing number of customers in by now former Soviet Union with a booming economic system. Valmar had drawn the number of hi-value contracts; it had grate potential to grow and create jobs, and to pay taxes, based on its real income.

But because of erroneous approach of Commissioner, who made customer deposits inclusive in taxable income to Valmar, he had to stop his business.

It took nine years (1993 – 2002), two the Tax Court hearings, the hearing of the Court of Appeals, four meetings between Markovski and his attorneys and attorneys of IRS, to prove, that customer's funds

are in fact "other people money" and not income to Valmar. Even as of today, there is the remaining issue of $ 291, 293 of "disallowed purchases", which the Tax Court still holds as taxable income to Valmar, completely ignoring the Court of Appeals ruling.

2. Markovski provided the Tax Court with nine counts of proof, why the amount $ 613, 410 represents solely his own saving, accumulated by him prior his emigration to United States, and has no any relation to the company Valmar.

None of his proofs were rebutted or impeached and otherwise was accepted by the Commissioner and the Tax Court.

Commissioner, on the other hand, had no proof, no theory, why the above amount should be included in Valmar's income.

3. The Court of Appeals directed the Tax Court to consider, "... if the customers deposits and wire transfers are not included in Valmar's income, Valmar's earning and profits for the tax years in questions are insufficient to support the constructive dividends to Markovski".

And if this is the case, the number of Valmar's earnings and profits of $ 810 is far insufficient to support $ 613, 410 of dividends to Markovski.

4. It took twelve years (1993 – 2005) to prove insufficiency of E&P of Valmar. How many years more it will take to prove, that Commissioner's new theory of a "capital gain", derived out of "sale of the

property" is inapplicable to the company, which, before year in question, simply did not exist and its "property" value was equivalent to "Zero"?

5. For eight years the Tax Court theory was, that Markovski derived constructive dividends out of earning and profits of Valmar: "*Since petitioners have failed to prove an insufficiency in American Valmar's earnings and profits, the distributions are dividends includable in Markovski's 1991 gross income*". (The Tax Court Order. November, 1998.).

Markovski is not convinced that the Tax low allows this "switch" of the theory of earnings and profits to the new theory of a capital gain, after it became evident that E&P was insufficient: "*It is not going to make much of a different, if there is earnings and profits or not...*" (The Tax Court trail. Transcript. 2005).

6. Decisions of the Tax Court regarding this case are controversial and conflict with its own theories.

REASONS FOR GRANTING THE PETITION

Markovski believes, that taxation of his personal lifetime saving, accumulated in Russia prior to his immigration, and transferred to United States immediately after he has got permeation of this Country to stay here, is going against his civil rights.

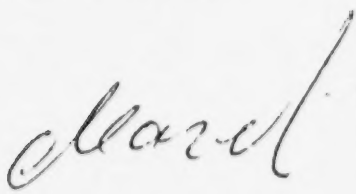
He have spend thirteen years, trying to proof his position, paid a fortune in attorney's fee and finally was reduced to represent himself *pro se.* Along the way Markovski also lost his company Valmar.

Therefore, he is seeking Justice with The United States Supreme Court.

America accepts tens of thousands of immigrants annually. Waist majority of newcomers have accumulated at least some wealth and property before they came in to United States. Many of them leave that wealth behind in the country, where they leaved before; some discretely bring it here and hiding it "in the pillow". All of this happens out of fear that money would be heavily taxed by American Government.

Immigrants don't feel it is fare, because they did not earn this money here. If this wealth put in the bank or any other tools of investments, all together it could bring to American economy additional milliards of dollars. It could also provide an additional income to the immigrants themselves and they would not have to relay on American government for financial or medical aid once they are retired.

For all the forgoing reasons, Petitioner respectfully urges this Court to grant his Petition for Writ of Certiorari.



Valeri Markovski
1512 Palisade Ave. Apt. 20 P
Fort Lee NJ 07024
(201) 947 4554

05.11.2006

INDEX OF APENDIXES

Court of Appeals Decision,
dated May 31, 2000.....A-1 – A-16

Court of Appeals Order,
dated June 4, 2003.....A-17 – A 18

Stipulation for Remand,
dated June 23, 2004.....A-19 – A-21

Tax Court Decision,
dated April 12, 2005.....A-22 – A-23

District Court Order,
dated June 20, 2005.....A-24 – A-26

Court of Appeals Order,
dated February 13, 2006.....A-27

Tax Court Order and Decision,
dated September 24, 2002.....A-28 – A-29

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term, 2000

Argued: May 31, 2000 Decided: Oct. 4, 2000
Docket Nos. 99-4169, 4170, 4171

AMERICAN VALMAR INTERNATIONAL LTD, INC. & VALERI MARKOVSKI,
Petitioners-Appellants,
v.
COMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Before: Winter and Parker, Circuit Judges, and Brieant District Judge.

Appeal from a United States Tax Court decision finding federal income tax deficiencies as well as additions to tax (James S. Halpern, Judge). Appellants argue that deposits from customers for use in Valmar's business as a commission broker were not taxable income. Appellants also argue that the Tax Court erred in attributing constructive dividends, disallowing certain deductions, and upholding the penalties assessed against them by the Commissioner. We conclude that those customer deposits over which appellants were not legally free to use as they pleased are not taxable income. We remand the case to the Tax Court for future findings.

---

*The Honorable Charles L. Brieant, United States District Judge for the Southern District of New York, sitting by designation.

Ira B. Stechel (Tomas J. Fleming, of Counsel)' Olshan Grundman Frome Rosenzweig & Wolosky LLP, New York, for Petitioners – Appellants.

Paula M. Junghans, Acting Assistant Attorney General (Richard Farber and Karen D. Utiger, Attorneys, Tax Division, Department of Justice, of counsel, Washington, D.C., for Respondent – Appellee.

WINTER, Chief Judge:

American Valmar International Ltd., Inc. ("Valmar") and Valeri Markovski ("Markovski") appeal from a decision of Tax Court Judge Halpern finding deficiencies and imposing accuracy-related and delinquency penalties for the taxable years 1991, 1992, and 1993. See American Valmar Int'l Ltd v. Commissioner, 76 T.C.M. (CCH) 911 (1998) (unpublished memorandum opinion).

On appeal, Valmar contends that the Tax Court erred in holding that: (i) customer funds deposited with Valmar were taxable income to Valmar; (ii) Valmar's taxable income could not be reduced by various deductions; and (iii) Valmar was subject to accuracy-related and delinquency penalties. Markovski contends that Tax Court erred in holding that he realized constructive dividends from expenditures by Valmar and from certain Wire transfers. He also challenges the imposition of accuracy-related penalties. We agree with Valmar that customer funds on deposit to be used to purchase goods for a customer should not have been

included as taxable income. Rather, only commissions earned by Valmar and that portion of the deposits that Valmar was not obligated to repay or use for customer's benefit should have been included. We remand for future findings. We affirm the Tax Court in all other respects save for various matters affected by our holding that genuine customer deposits were not income to Valmar.

BACKGROUND

Markovski is the sole shareholder of Valmar, a New York corporation. He was born in Dnepropetrovsk, U.S.S.R., immigrated to the United States, and now is citizen. During the tax years in question, Valmar was a commissioner broker, purchasing American goods on behalf of four customers in the former Soviet Union. The present dispute arose when the Commissioner of Internal Revenue issued notice of deficiency to both Valmar and Markovski alleging underpayments in federal income tax, as well as additions to tax, for the 1991 tax year with respect to Markovski, and the 1991, 1992 and 1993 tax years with respect to Valmar.

a) Valmar's Customer Account

During the tax years in question, Valmar's less-than-comprehensive records recorded various wire transfers in an "accounts-payable-contacts" account (hereafter "customer account"). It claims that the entirety of the customer account consisted of funds deposited by customers to be used to purchase goods on their behalf. The funds were held in interest-bearing accounts or used to purchase U.S. Treasury bills until distributed. Valmar retained all interest earned. At the end of each year, the account reflected debits for

purchases made by Valmar on behalf of the customers and the commissions earned by Valmar. On its tax returns, Valmar did not report as income the balance of deposits received during a year after debiting expenditures for purchases on customer's behalf and commissions earned (hereafter "year-end balances"). These balances amounted to $1, 426, 653, $1, 507, 440, and $32, 335 for 1991, 1992 and 1993 respectively. Rather, Valmar included as income only amount of its commissions, which ranged between five and eight percent of the gross purchase price of the exported goods. The Commissioner contends that the entirety of the funds constituted taxable income to Valmar because, in her view, the funds were not hold solely for the benefit of Valmar's customers. The Tax Court agreed.

However, the Tax Court did not hold that the funds were income to Valmar disguised as customer deposits. Rather, it found that Valmar was in fact commissioner broker and that at least some of the funds transferred by its customers were intended – save for the payment of commissions – to be used to purchase goods on behalf of the customers. Nevertheless, it inferred from two transactions claimed by Valmar as deductions that year-end balances in customer account were in their entirety income to Valmar.

In the first transaction, Valmar debited $57, 137 to a customer account in 1991 for improvements to a condominium apartment owned by Markovski and his wife. They testified that the improvements were undertaken on behalf of a customer who wished to use the apartment as a living space and office for its

employees when they visited the United States. The Tax Court discredited this testimony and found that the improvements were undertaken for Markovski's benefit. It therefore agreed with the Commissioner that the debited amount should have been included in Valmar's gross income and attributed to Markovski as a constructive dividend. In the second transaction, Valmar debited $24, 500 to the customer account in 1993 pursuant to what Markovski said were instructions from the customer to transfer the funds to an individual named Mila Panarey. The Tax Court again discredited Markovski's testimony because it fond that the funds were eventually given to a woman named Ludmila Piker' a former consultant for Valmar and Markovski's step-daughter. It therefore agreed with the Commissioner that the amount should have been included in Valmar's gross income.

Based on its findings regarding these two transactions, the Tax Court went on to hold that the year-end balances should have been included in Valmar's gross income. In doing so, the Tax Court reasoned that the two transactions caused it to doubt whether Valmar held the reminder of the customer account "under an obligation to use [the funds therein] solely for the benefit of the customers".

b) The Ruble "Hoard"

During the tax years in question, Markovski received other wire transfers directly into his personal bank accounts. Six deposits totaling $746, 340 were made in 1991, and one deposit of $1, 600, 000 was made in 1992. Markovski argues that these deposits were not income but represented the transfer of a "ruble hoard" that he had earned and amassed while

living in the former Soviet Union. Markovski testified that his contacts abroad wired him the funds labeled as business transactions only to evade currency controls in the former Soviet Union. Although the Tax Court agreed that Markovski accumulated substantial wealth before emigrating, it concluded that notations on the six1991 transfers demonstrated that they were not personal funds amassed in Russia but were related to Valmar's business. The Tax Court therefore included the six in Valmar's income and treated them as a constructive dividend to Markovski.[1] The seventh wire transfer in 1992 was treated as reflecting the ruble hoard.

c) Penalties

Finally, because the Commissioner asserted that Valmar and Markovski had substantially understated their income for the tax years in question, it assessed accuracy-related penalties against both of them See I.R.C. 6662 ("[T]here shall be added to the tax an amount equal to 20 percent of the portion of the underpayment... which is attributable to ... [a]ny substantial underpayment of income tax."). The Commissioner also determined a delinquency penalty against Valmar because its returns were overdue for the three tax years in question. See I.R.C. 6651 (adding five-percent penalty each month for late filing absent reasonable cause). The tax Court upheld all of the penalties, although it adjusted them to take into account its recalculation of the deficiencies.[2] This appeal followed.

DISCUSSION

We must uphold the tax Court's factual findings unless they are clearly erroneous, see Addington v. Commissioner, v. 205 F. 3d 54, 57 (2d Cir. 2000), and "particularity strong deference" is owed where the trial court bases its findings upon its determination of witnesses' credibility. Mathie v. Fries, 121 F 3d 808, 812 (2d Cir. 1997) (quoting Castrol, Inc. v Quaker State Corp., 977 F. 2d 57, 64 (2d Cir. 1992). We of course review the Tax Court's conclusions of law de novo. See Texasqulf, Inc. v. Commissioner, 172 F 3d 209, 214 (2d Cir. 1999).

In general, "[t]he Commissioner's determination of an income tax deficiency enjoys a presumption of correctness, requiring a taxpayer petitioning for review to prove it wrong." Douge v. Commissioner, 899 F. 2d 164, 167 (2d Cir. 1990) (citing Welch v. Helvering, 290 U.S. 111, 115 (1933)); see Tax Ct. R. 142 (placing burden of proof on petitioner).[3]

a) Valmar's Customer Account

Appellants claim that the Tax Court erred in holding that the year-end balance of customer deposits received in a tax year by Valmar constituted taxable income. This dispute concerns whether the deposits were at Valmar's disposal to use for its own benefit or whether Valmar had an obligation either to return unused funds to its customers or to hold them for later purchases on behalf of customers. One might reasonably harbor doubt regarding the nature of the customer account because of the paucity of intelligible

records kept by Valmar. However, the Tax Court held, "[W]e have examined the records and are unconvinced that either their minimal extend or seeming inconsistencies prove that the customers did not exist or that... Valmar had no obligations to them." Nevertheless, because of the two disputed transactions described above – the improvements to the condominium and the wire transfer to Panarey – the Tax Court expressed uncertainty as to whether any of the deposits were "held under an obligation to use them solely for the benefit of the customers." Although the total value involved in the two transactions was only $81, 637, the Tax Court upheld the Commissioner's inclusion of all the year-end balances in the customer account for each of tax year in question, adding $2, 966, 428 to Valmar's taxable income. We disagree that transactions amounting to 2.8% of the total held by Valmar justified inclusion of all of the balances in the account as income.

Customer deposits over which the recipient does not have "complete domination" are not taxable as income upon their receipt. See Commissioner v. Indianapolis Power & Light Co., 493 U.S. 203, 209 (1990). Indianapolis Power involved a utility company that required deposits from customers with poor credit as security for the extension of credit. Customers could obtain refunds of their deposits upon demonstrating adequate credit or upon termination of their service. In holding that the deposits should not have been included in the utility company's taxable income, the Court held that the "question... cannot be resolved simply by noting that respondent derives some

economic benefit from receipt of these deposits." Id. at 210-11.

The Commissioner argues that Indianapolis Power is inapposite because Valmar did not show that the funds at issue were either to be used for the customers or to be returned. However, the Tax Court specifically and not unreasonably fond that Valmar had real customers and had at least some obligations to them regarding the funds in the customer account. As in Indianapolis Power, the deposits by Valmar's customers were not commitments to purchase a specified quantity of goods. See id. Indeed, the Tax Court found that "[a]t the time... Valmar received funds from customers, it did not necessarily have instructions as to how those funds were to be used". Just as in Indianapolis Power, were "IPL's right to keep money depends on the customer's purchase of electricity, and upon his later decision to have the deposits applied to future bills", id at 211, Valmar's right to use at least some of the excess funds in the customer account depended on whether customers requested additional goods or a refund. Moreover, the "question... cannot be resolved simply by noting that respondent derives some economic benefit from receipt of these deposits." Id. at 208 – 209.
The test is, therefore, not whether the funds inure exclusively to the customer's benefit. Rather, the proper test is whether Valmar had an obligation to use them for the customer or repay any excess, or, conversely, whether it had the right to use them on its own behalf. See Houston Indus. Inc. v. United States, 125 F. 3d 1442, 1445 (Fed. Cir. 1997). (holding over recoveries by utility company not included in taxable

income where used to offset against under recoveries because such offsets have same effect as refund); Kansas City southern Indus., v Commissioner, 98 T.C. 242, 261 (1992), acq. In part and nonacq. In part, 1994-45 I.R.B. 4 (1994) ("Both the Supreme Court and this Court have rejected contentions by [the I.R.S.] that control over the deposits, unrestricted use of the funds, and nonpayment of interest negated the obligation to repay or demonstrated complete domination over deposits."); Oak Indus., Inc. v. Commissioner, 96 T.C. 559, 569-70, 575 (1991) (holding security deposits obtained by television subscription service, which were usable as offsets against services and refundable on termination, were not taxable income, even though they were not segregated and even though provider could use them as it saw fit); cf. Commissioner v. Tufts, 461 U.S. 300, 307 (1983) ("When a taxpayer receives a loan, he incurs an obligation to repay that loan at some future date. Because of this obligation, the loan proceeds do not qualify as income to the taxpayer.")

In reversing, we overturn the factual findings of the Tax Court in the only limited way. The Tax Court's finding that the condominium improvements and the wire transfer to Panarey were not related to Valmar's business simply does not support the inference that funds in the customer account were entirely available for it to use on its own behalf. Given the Tax Court's finding that Valmar had real customers and real obligations to those customers, at least some, if not all, of the funds in the year-end balances were true customer deposits that Valmar had an obligation to refund or use fir the customers. The condominium and

Panarey transactions do not undermine that conclusion. For example, it is to be expected that a commission broker will receive some of the funds deposited by customers as compensation, and those transactions may therefore be disguised commissions. Moreover, even if a commission broker diverted some customer funds unlawfully, the entire amount of deposits would not thereby become taxable income. To be sure, the frequent use of funds in one's possessions for personal purposes may be evidence of dominion. However, the inference drawn here was based on two small transactions over three years and is not consistent with the finding that Valmar had real customers and real obligations regarding the funds.

It does not follow, however, that all of the year-end balances in the customer account, save for the condominium and Panarey expenditures, are not taxable. Because the Tax Court's inquire ended with finding that two of the Valmar expenditures were not business related, it did not inquire into whether there are reasons to conclude that other portions of the year end balances were subject to Valmar's complete control and therefore taxable. On remand, the Tax Court should, therefore, determine what portion, if any, of the $2, 966, 428 is taxable according to the legal standard set out in this opinion.

Valmar also argues that the Tax Court erred in sustaining the Commissioner's disallowance of additional deductions of $291, 293, $104, 894 and $38, 828 for the 1991, 1992, and 1993 tax year, respectively. Specifically, Valmar contend that these amounts had been conceded by the Commissioner as deductible. The Tax Court, in an order denying

appellants' motion for reconsideration, rejected Valmar's arguments as to the alleged concessions and held that appellants had not otherwise substantiated their right to the deductions at trial Given that taxpayers bear the burden of establishing their rights to deductions, see American Dispenser Co. v. Commissioner. 396 F 2d 137, 138 (2d Cir. 1968), and the Tax Court's findings are amply supported by the evidence, we agree with the Tax Court that Valmar has not met its burden with regard to the claimed deductions. (Of course, the deduction issues are moot if none of the year-end balances in the customer account are taxable income.)

b) The Ruble Hoard

The Tax Court findings as to the wire transfers to Markovski and the claim of a ruble hoard are factual findings based on its assessment of Markovski's credibility and notations on the wire transfers. Given the difference accorded to a trier's credibility determinations, we cannot say that the Tax Court's holding that the six 1991 deposits did not represent part of Markovski's previously acquired ruble hoard was clearly erroneous. We therefore affirm the Tax Court's holding that the 1991 deposits should have been included as both income to Valmar and a constructive dividend to Markovski. See Truesdell v. Commissioner, 89 T.C. 1280, 1300 (1987) ("[D]iverted amounts taxed to a shareholder as constructive dividends also remain fully taxable to a corporation to which attributable."); cf. Chong v. Commissioner, 68 T.C.M. (CCH) 794 (1994) (unpublished memorandum opinion) (holding that cash hoard acquired before emigration is not included in

taxable income). As previously noted, we also affirm the Tax Court's determination that the $57, 137 spent to improve the condominium inured to Markovski's benefit and was therefore a constructive dividend.[4]

c) Penalties

Appellants also argue that the Tax Court erred in sustaining the Commissioner's assessment of a delinquency penalty against Valmar and understatement penalties against both Valmar and Markovski. Section 6651 of the Tax Code provides for the imposition of an additional five-percent charge each month on the amount of tax due (not to exceed twenty five percent in the aggregate) for failure to file a return, unless the tax payer can show reasonable cause and the absence of willful neglect. See I.R.C. 6651. Factors constituting reasonable cause include " unavoidable postal delays, death or serious illness of the taxpayer... or reliance on the mistaken opinion of a competent tax advisor... that it was not necessary to file a return". Marrin v. Commissioner, 147 F. 3d 147 152 (2d Cir. 1998). The taxpayer bears the burden of proving that a return was timely filed. See Sullivan v. Commissioner, 985 F. 2d 704, 706 (2d Cir. 1993); Tax Ct. R. 142 (a). The Tax Court based its conclusion that Valmar returns were untimely filed on a weighing of the testimony of appellant's accountant regarding when the returns were mailed against the Commissioner 's evidence, which included postmarks. It was not clearly erroneous for the Tax Court to find

that the accountant's testimony was "inexact and unconvincing," and we therefore affirm the imposition of the delinquency penalty against Valmar.

Section 6662 of the Tax Code provides for a penalty of twenty percent of the portion of the underpayment where the underpayment of tax is due to, among other things, the substantial understatement of income tax. See I.R.C. 6662 (b) (2). Under the Code, "there is a substantial understatement of income tax... if the amount of the understatement ... exceed the greater of (i) 10 percent of the tax required... or (ii) $5, 000 [$10, 000 in the case of corporations]." I.R.C. 6662 (d) (1). However, no penalty will be imposed if the understatement is attributable to, among other things, the fact that there is or was substantial authority for the taxpayer's treatment of the item. See I.R.C. 6662 (d) (2) (B); Treas. Reg. 1.6662-4 (d) (2) ("The substantial authority standard is an objective standard involving an analysis of the law and application of the law to relevant facts.")
Given our present decision, we reverse the imposition of accuracy related penalties with respect to the year-end balances in the customer account, subject to the Tax Court's revisiting the issue with regard to portions of the balances found to be taxable on remand.

The accuracy-related penalty imposed against Markovski was due to his failure to include on his return the amounts the Commissioner deemed were constructive dividends. Because we have affirmed the Tax Court's treatment of those items without difficulty in the light of the paucity of documentary support from Markovski, we affirm the accuracy-related penalty

imposed against Markovski for his failure to include them.

CONCLUSION

For the reasons stated above, we affirm the Tax Court's decision with regard to the constructive dividends and accuracy-related penalty imposed against Markovski, the delinquency penalty imposed against Valmar, and the conclusion that the condominium improvements and the Panarey wire transfer were not business-related. However, we remand for future findings on what portion of the year-end balances in the customer account should have been included in Valmar's taxable income and, once those findings have been made, whether an accuracy-related penalty against Valmar remains appropriate.

FOOTNOTES

1. Two of the six transfers were, as the Tax Court noted, "[I]nexplicably...omitted" in the Commissioner's adjustment to appellants' income. Therefore, the total adjustment made was $613, 410 not $746, 340.

2. Appellants had challenged the Commissioner's inclusion in Valmar's gross income of additional $337, 000. Valmar argued that it had transferred that amount to the bank account of one of its customers pursuant to the customer's request. The Tax Court agreed with Valmar and did not sustain the deficiency with regard to those funds.

3. In part of their brief - - with respect to the ruble hoard in particular - - appellants argue that the burden should be shifted to the Commissioner. See Gold Emporium, Inc. v. Commissioner, 910 F. 2d 1374, 1378 (7th Cir. 1990) (holding Commissioner's presumption of correctness inapplicable where assessment lacks "rational foundation or is arbitrary and erroneous") (internal quotation and citation omitted). The distinction suggested in Gold Emporium seems somewhat elusive. If a taxpayer can show that deficiency assessment lacks a "rational foundation or is arbitrary and erroneous," it would seem that that showing would itself overcome the presumption of correctness and the additional argument that the burden has shifted to the Commissioner would be superfluous. In any event, we see no such demonstrative lack of merit in the assessment that would induce us to apply Gold Emporium's analysis to this case.

4. Appellants contend that if the customer deposits and wire transfers are not included in Valmar's income, Valmar earnings and profits for the tax years in question are insufficient to support the constructive dividends to Markovski. Because we have not revised the Tax Court as to the "ruble hoard" transfers and cannot predict what portion of the deposits the Tax Court will find to be excluded from Valmar's taxable income, we leave this issue to future proceeding and express no view on it.

U.S. Tax Court
Nos. 11776-95
11777-95

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4th day of June, two thousand and three,

Present: Hon. Guido Calabresi, Hon. Robert D. Sack, Circuit Judges.
Hon. Nicholas G. Garaufis*, District Judge.

Valeri Markovski and American Valmar International Ltd., Inc., Plaintiffs-Appellants,

v. 02-4692

Commissioner of Internal Revenue, Defendant-Appellee.

Appellant Markovski has moved for appointment of counsel on behalf of American Valmar International, Ltd., Inc. This Court cannot appoint counsel to American Valmar because it lacks statutory authority to appoint counsel to represent a corporation. See 28 U.S.C. 1915; Rowland v. California Men's Colony, 506 U.S. 194, 202-03 (1993). However, because this Court believes that Markovski's position is likely to be of substance, it is ORDERED that counsel is appointed, *nostra sponte*, to assist Markovski with the appeal on his own behalf, should he wish it. See 28 U.S.C. 1915(e)(1); Cooper v. A. Sargenti Co., 877 F.2d 170, 172-74 (2d Cir. 1989). In addition to any other arguments counsel wishes to rise, counsel should

address whether the Tax Court committed clear error in failing to evaluate whether, after its adjustments to Valmar's 1991 income, that income was still sufficient to support the constructive dividends charged to Markovski's personal income in 1991. See United States v. Bok, 156 F.3d 157, 162 (2d Cir. 1998). Since there exist no non-frivolous issues on behalf of American Valmar in this appeal, it is FURTHER ORDERED that the appeal is dismissed with respect to American Valmar. See Pillay v. INS, 45 F. 3d 14, 17 (2d Cir. 1995). Counsel will be appointed to Markovski from the pro bono panel, at which time a schedule for the filing of briefs will be entered by the clerk's office.

FOR THE COURT:
Roseann B. MacKechnie, Clerk
S/_____

Filed: June 4, 2003.
United States Court of Appeals, Second Circuit.

---

*The Honorable Nicholas G. Garaufis, of the Unite States District Court for the Eastern District of New York, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND SIRCUIT

Valeri Markovski, Petitioner-Appellant
American Valmar International, Ltd., Inc., Petitioner
v.
Commissioner of Internal Revenue,
Respondent-Appellee.

No. 02-4692

Stipulation for Remand

WHEREAS, the commissioner of Internal Revenue ("Commissioner") assessed deficiencies against American Valmar International Ltd., Inc. ("Valmar") for 1991-1993 and against appellant Valeri Markovski ("Markovski") for 1991 and 1992 tax years; and
WHEREAS, the Tax Court sustained the Commissioner's determination that year-end balances in Valmar's accounts containing customer deposits represented taxable income to Valmar and that Markovski had received constructive dividend income through wire transfers to his bank accounts from accounts abroad; and
WHEREAS, Valmar and Markovski appealed the decision of the Tax Court, and on October 4, 2000, this Court issued an opinion remanding the case for future findings as to what portion of the year-end balances in Valmar's accounts containing customer deposits should have been included in Valmar's taxable income, and left to future proceedings the issue of whether Valmar's earnings and profits for the tax year in question are sufficient to support the constructive dividends to Markovski; and

WHEREAS, on remand the Commissioner conceded that none of the year-end balance amounts in Valmar's customer accounts should be included in the corporation's income, and submitted motions for entry of decision for Valmar, reflecting the concession, but did not move for entry of a new decision in Markovski's individual case; and

WHEREAS, the Tax Court granted the Commissioner's motion without making a revised factual finding as to whether Valmar's earnings and profits, as adjusted after the Commissioner's concession, were sufficient to support constructive dividend to Markovski for 1991 in the amount assessed, $613, 410; and

WHEREAS, Markovski and Valmar appeal the Tax Court rulings and on June 4, 2003, this Court dismissed appeal of Valmar and appointed counsel to represent Markovski; and

WHEREAS, undersigned counsel on behalf of Markovski filed the Brief for Petitioner-Appellant on April 26, 2004, requesting remand to the Tax Court, so that the Tax Court may determine whether Valmar had sufficient earnings and profits for Valmar's 1991 taxable year to support a $613, 410 (or some lesser amount) taxable constructive dividend to Valeri Markovski in 1991 tax year; and

WHEREAS, the Commissioner filed a Motion to Remand Case to Tax Court and suspend Briefing on June 8, 2004, requesting that the case be remanded to the Tax Court to allow the court to address the issue of Markovski's individual tax liability.

IT IS HEREBY STIPULATED and agreed to by and between the attorneys for Valeri Markovski, appellant herein, and the Commissioner of Internal Revenue,

appellee herein, that this action be remanded to the Tax Court, so that the Tax Court may determine whether Valmar had sufficient earnings and profits for Valmar's 1991 taxable year to support a $613, 410 (or some lesser amount) taxable constructive dividend to Valeri Markovski in 1991 tax year, and determine Markovski's tax liability for that year.

DATED June 23, 2004

Respectfully submitted, s/_____
Randolph L. Hutter, Attorney.
Appellate Section
Tax Division, Department of Justice.
Post Office Box 502 Washington D.C. 20044
(202) 514-2647
Counsel for Appellee

Respectfully submitted, s/_____
Tess H. Autery (TA 3300)
Jonathan M. Jacobson, (JJ 0605)
Akin Gump Srauss Hauer & Feld, LLP
590 Madison Avenue, New York, New York 10022
(212) 872-7477
Counsel for the Appellant
Certified 6/30/04

For the Court Roseann B. Mackkechnie Clerk of Court
By s/_____Stanley A. Bass, Staff Counsel
June 30 2004.

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Valeri Markovski, Petitioner,

Docket No. 11777-95

v.

Commissioner of Internal Revenue,
Respondent.

DESCISION

By mandate of the Court of Appeals for the Second Circuit, dated June 30, 2004, this case is before the Court to determine whether American Valmar International, Ltd., Inc. (Valmar), had sufficient earnings and profits for Valmar's taxable year ending June 30, 1991 (1991Tax year), to support a constructive dividend to petitioner for his 199 taxable year in the amount of $612, 410 (or in some lesser amount) and to determine any deficiency in petitioner's tax liability for that year.

The parties have made numerous filings with respect to the task set for us by the Court of Appeals and, on March 15, 2005, the Court conducted a hearing (the hearing) in New York City to hear from the parties regarding Respondent's Computation for Entry of Decision filed November 15, 2004. Following the hearing, respondent filed Respondent's Revised Computation for Entry of Decision (respondent's revised computation) and petitioner filed his Objection to Respondent's Revised Computation for Entry of Decision. The Court agrees with respondent's revised computation for the reasons set forth in the transcript of the hearing. Therefore, pursuant to the mandate of

the Court of Appeals, and incorporating herein the facts recited in respondent's revised computation as the findings of the Court, it is

Tax Liability		$210, 059.00
Assessment:		
Paid	$2, 936.00	
Unpaid	$207, 154.00	$210, 090.00
Deficiency (to be assessed)		($31.00)

That there is a penalty due from petitioner for the taxable year 1991, under the provisions of I.R.C section 6662 (a), in the amount of $41, 485.00.

(Signed) James S. Halpern
Judge

Entered: Apr.12 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUDGE MUKASEY
05 CV 6559
ORDER OF DISMISSAL

Valeri Markovski, Plaintiff,
against
Commissioner of Internal Revenue, Defendant.

Plaintiff brings this action *pro se* after paying the requisite filing fee. The Clerk of Court shall assign a docket number to this action, but I dismiss the complaint for the following reason.

Background

This case arises out of plaintiff's litigation dating back to 1995 over his taxes relating to tax years 1991, 1992 and 1993. On June 30, 2004, upon consent of the parties, the United States Court of Appeals for the Second Circuit remanded plaintiff's case to the United States Tax Court to determine whether plaintiff's company Valmar had sufficient earnings and profits for 1991 to support a certain constructive dividend to plaintiff for that year and to determine any deficiency in plaintiff's tax liability for that year. See Markovski v. Commissioner of Internal Revenue, No. 02-4692 (2d Cir. June 30, 2004). On March 15, 2005, the United States Tax Court held a hearing on the matter, after which the Commissioner filed a Revised Computation of the taxes and penalties owed by plaintiff. On April 12, 2005, the Tax Court held that it agreed with the Commissioner's Revised Computation

and entered judgment reflecting its decision. See Markovski v. Commissioner of Internal Revenue, No. 11777-95 (U.S. Tax Court. Apr. 12, 2005).

Plaintiff filed this action on May 23, 2005 alleging that the Tax Court "completely ignore[d] the Court of Appeals instructions" by determining that Markovski received the dividend "without taking in consideration that Valmar did not have E & P [earnings and profits] to support this constructive dividend". Complaint at 1. He the details the reasons that the April 12, 2005 decision was incorrect and asks this Court to "[ac]cept [his] complaint. Complaint at 4-6.

Subject Matter Jurisdiction

This Court does not have jurisdiction over plaintiff's challenge to the United States Tax Court's April 12, 2005 decision. "The United States Court of Appeals... shall have exclusive jurisdiction to review the decisions of the Tax Court..." 26 U.S.C. § 7482(a)(1). Because this Court, which is a district court and not a court of appeals, does not have jurisdiction over plaintiff's challenge to the United States Tax Court's April 12, 2005 decision, the complaint must be dismissed. See United Food & Commercial Workers Union, Local 919, AFL-CIO v. CenterMark Properties Meriden Square, Inc., 30 F.3d 298, 301 (2d Cir. 1994) ("[I]t is common ground that in our federal system of limited jurisdiction any party or the court *sua sponte*, at any stage of the proceedings, may rise the question of whether the court has subject matter jurisdiction. Where jurisdiction is lacking, ...dismissal is mandatory".) (quoting Manway Constr. Co. v. Housing Auth. Of

Hartford, 711 F.2d 501, 503 (2d Cir. 1983); see also Fed. R. Civ. P. 12 (h)(3).

Conclusion

Accordingly, the complaint, filed *in forma pauperis* under 28 U.S.C. § 1915(a), is dismissed for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1) and 12(h)(3). I certify under 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith. See Coppedge v. United States, 369 U.S. 438, 444-45 (1962).

SO ORDERED:

S/_____
MICHAEL B. MUKASEY
Chief Judge

Dated: Jul. 20 2005
New York, New York

United States Tax Court
No. 11777-95 Gerber, C.J.

UNITED STATES COURT OF APPEALS
For the SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, at the City of New York, on the 13th day of Feb. two thousand six,

Present: Hon. Dennis Jacobs, Hon. Richard C. Wesley, Hon. John R. Gibson,* *Circuit Judges.*

Valeri Markovski, Petitioner,

v. 05-4192-ag

Commissioner of the Internal Revenue, Respondent.

Petitioner, *pro se,* appeals from an April 2005 decision of the United States Tax Court. The Government moves to dismiss Petitioner's appeal as untimely and Petitioner moves "to dismiss the Government's motion to dismiss". Upon due consideration, it is ORDERED that the Government's motion is GRANTED and the appeal is DISMISSED. This Court lacks jurisdiction over this appeal because the notice of appeal was untimely filed pursuant to Rule 13(a) of the Federal Rules of Appellate Procedure. It is future ORDERED that the pending "motion to dismiss the Government's motion to dismiss" the appeal is denied as moot.

FOR THE COURT:
Roseann B. MacKechnie, Clerk
By s/_____

Feb 13 2006

UNITED STATES TAX COURT

AMERICAN VALMAR INTERNATIONAL LTD., INC., Petitioner

v. Docket No. 1176-95

COMMISSIONER OF INTERNAL REVENUE, Respondent.

ORDER AND DECISION

Respondent has moved for entry of decision. Petitioner objects. Respondent has respondent to petitioner's objection.

On October 4, 2000, the Court of Appeals for the Second Circuit affirmed in part and revised in part this Court's decision in this case. American Valmar Intl. Ltd., Inc. v. Commissioner, 229 F 3d 98 (2d Cir. 2000) affg. in part and revg. In part T.C. Memo. 1998-419. The mandate of the Court of Appeals returned the case to this Court for future proceedings in accordance with opinion of the Court of Appeals. The Court of Appeals affirmed this Court in every respect except: "We remand for future findings on what portion of the year-end balances in the customer account should have been included in Valmar's taxable income and, once those findings have been made, whether an accuracy-related penalty against Valmar remains appropriate." The adjustment in respondent's notice of deficiency dated April 6, 1995, with respect to petitioner 1991 taxable year that reflects year-end balances in petitioner's customer accounts is an adjustment of $1, 426, 653 for gross profit. In his motion for entry of decision, respondent informs the Court that he concedes that

adjustment in full. Attached to respondent's motion is a computation for entry of decision based on respondent's concession. Respondent's concession fully addresses the mandate of the Court of Appeals, and respondent's computation accurately reflects the concession. In petitioner's objection, they attempt to raise issues outside the scope of the Court of Appeals mandate. We cannot consider those objections.

On the premises stated, it is

ORDERED that respondent's motion for entry of decision filed June 19, 2002, is granted. It is further ORDERED and DECIDED: that the following statement shows petitioner's income tax liability for the taxable year ended June 30, 1991:

Tax liability		$307, 874. 00
Assessment:		
Paid	$122. 00	
Not paid	307, 752. 00	$307, 874. 00
Deficiency (to be assessed)		None

That there is an addition to the tax due from the petitioner for the taxable year ended June 30, 1991, under the provisions of I.R.C. section 6651 (a) (1) in the amount of $76, 669. 00, without taking into consideration the assessment made on November 19, 1999; and

That there is a penalty due from the petitioner for the taxable year ended June 30, 1991, under provisions of I.R.C. section 6662 (a), in the amount of $61, 551. 00 without taking into consideration the assessment made on November 19, 1999.

S/_____

James S. Halpern Judge

Entered Sep. 24 2002